IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5860 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

STATE BANK OF INDIA - Petitioner(s)
Versus
DINESH R SHAH - Respondent(s)

==========

Appearance :
MR DIPAK C RAVAL for Petitioner(s) : 1,
MR KETAN D SHAH for Respondent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 12/04/2007

ORAL JUDGMENT

1. In the present petition, the petitioner State Bank of India has challenged the legality of an order dated 29th April, 2005 passed by the Small Causes Court, Ahmedabad below exh.15.

2. Shortly stated facts leading to the present petition are as follows :

2.1 The petitioner and respondent herein had entered into an agreement for execution of certain construction work. The respondent is an Architect by profession. Upon completion of execution of work, respondent had raised certain monetary demands from the petitioner. The petitioner did not fulfill the demands so raised. Respondent was therefore, compelled to file Summary Suit before the City Civil Court, Ahmedabad being Summary Suit No.6103/2003. For sometime thereafter, there was transfer of jurisdiction in this category of cases from City Civil Court, Ahmedabad to Small Causes Court, Ahmedabad. Summary Suit was therefore, transferred to Small Causes Court.

2.2 The petitioner herein filed an application exh.15 in the said suit contending inter-alia that in agreement dated 20th June, 1998 under which the plaintiff was entrusted the work contract and under which he seeks recovery from the defendant contains arbitration clause. The defendant i.e present petitioner therefore, prayed before the Small Causes Court that the Court may appoint an arbitrator and refer the dispute for adjudication thereof. This application was filed on 18th August, 2004.

2.3 After hearing both sides, learned Judge by his impugned order rejected the application of the petitioner bank. Learned Judge was of the opinion that the petitioner bank was not serious about arbitration and has not made any attempt earlier for seeking arbitration. It was observed that no provisions are made for arbitration in the agreement clause regarding remuneration of the arbitrator which convinced the learned Judge to believe that the arbitration clause is lacking in material particulars. It was also observed that application for appointment of arbitrator and the reference was made belatedly.

2.4 The appeal preferred by the petitioner bank against the said decision of the learned Judge of the Small Causes Court came to be turned down by the Division Bench of the said Court by an order dated 21st February, 2006, passed in Appeal from Order No.48/2005. Aggrieved by the said orders, petitioner bank has preferred the present petition.

3. It is not in dispute that in the agreement between the parties, clause-8 pertained to arbitration. The said clause reads as follows :

“8. If any dispute, difference or question shall at any time arise between the parties as to the construsion of this agreement or concerning anything herein contained or arising out of this

agreement or as to the rights, liabilities and duties of the said parties hereunder, or as to the execution of the said works, except in respect of matters for which it is provided herein that the decision of the Employer is final and binding, the same shall be referred to the arbitration and the final decision of an arbitrator to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single arbitrator, to the appointment of two arbitrators shall, before taking upon themselves the burden of reference, appoint an umpire."

4. The arbitration clause in the agreement is sufficiently clear and provides no ambiguity. It is also not the case of respondent herein that there was no arbitration clause in the agreement. That being so, requirements of Section 7 of the Arbitration and Conciliation Act, 1996(here-in-after referred to as "the said Act") stand fulfilled. Clause 8 of the agreement being an arbitration agreement as required under Section 7 of the said Act, one shall have to examine whether under Section 8 of the said Act, the petitioner had a right to insist that the Small Causes Court refrains from entertaining the suit and instead refer the matter for arbitration. Section 8 of the said Act reads as follows :

"8. Power to refer parties to arbitration where there is an arbitration agreement.-(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section(1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section(1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

5. It can thus be seen that once there is an arbitration agreement between the parties as defined in Section 7 of the said Act and if the party so applies not latter than when submitting his first statement on the substance of the dispute, the judicial authority before whom the action is brought is required to refer the parties to arbitration.

6. In the present case, it is not in dispute that the petitioner filed such an application before the Small Causes Court before submitting his first statement on the substance of the dispute. That being so in my view, learned Judge of the Small Causes Court materially erred in not invoking the provisions contained in Section 8 of the said Act and referring the dispute to arbitration. Reasons stated for not doing so do not appeal to this Court. As noted earlier, both the requirements of existence of arbitration agreement between the parties as explained in Section 7 of the said Act and an application for

such reference being made before filing reply on substance of dispute were fulfilled. Learned Judge therefore, materially erred in not accepting the application of the petitioner. For the same reason appellate order also cannot be sustained.

7. I am unable to accept the contention of the learned counsel for the respondent that there was no dispute between the parties which could have been referred to arbitrator. Whether the petitioner bank is in a position to defend itself before the arbitrator once reference is made, is a premature question. Ultimate result of the arbitration proceedings are neither possible nor necessary for this Court to contemplate.

8. In the result, petition is allowed. Impugned orders dated 29th April, 2005 and 21st February, 2006 are quashed. Learned Judge in charge of said summary suit shall act in terms of Section 8 of the said Act for appointment of arbitrator in reference to the dispute bearing in mind the observations made here-in-above.

9. In the result, petition is disposed of in the above terms. Rule made absolute. No order as to costs.

(Akil Kureshi,J.)

(raghu)